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No. 85-1387

In the Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. CESARONI, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' claim of breach of contract falls within the federal admiralty jurisdiction under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*

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OPINION BELOW

The order of the court of appeals (Pet. App. 22) is unreported. The opinion of the district court (Pet. App. 1-21) is reported at 624 F. Supp. 613.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23) was entered on December 17, 1985. The petition for a writ of certiorari was filed on February 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Cesaroni was the owner of several shrimp vessels, including the *Rubber Duck,* which he operated out of Key West, Florida. In late 1981, Cesaroni was approached by persons who sought the use of one of his shrimp boats for smuggling purposes. Pet. App. 4. Cesaroni

contacted United States Customs agents with this information. According to the district court, the agents encouraged Cesaroni to cooperate with the smugglers, offering him a monetary reward if his assistance proved fruitful; Cesaroni evidently agreed to allow the Customs Service to place a transponder aboard the vessel chosen by the smugglers, to facilitate the tracing of the ship's movements. *Id.* at 5-6.

On January 15, 1982, the smugglers informed Cesaroni that they had decided to use the *Rubber Duck*. To assure secrecy, however, the smugglers held Cesaroni at gunpoint until they were ready to depart; at that point, they released him and gave him $10,000 for the use of his boat. After the smugglers' departure, Cesaroni contacted Customs agents and provided them with a description of the smugglers and with one of their nautical charts. Using this information, the Coast Guard located and seized the *Rubber Duck* off the Yucatan Peninsula. The Coast Guard found the smugglers and a cargo of marijuana on board. Pet. App. 7-8.

Cesaroni subsequently petitioned the government for release of the vessel and, on November 30, 1982, the Department of the Treasury remitted the forfeiture of the *Rubber Duck* and offered to release it upon the execution of a hold harmless agreement (Pet. App. 9). When petitioner refused to execute such an agreement, unconditional remission was authorized (*id.* at 10). In the interim, however, the vessel had been seized for foreclosure purposes. The *Rubber Duck* was sold for $139,000 to a third party in a foreclosure sale on June 9, 1983. Pet. 9.

2. Cesaroni then commenced this action against the government in the United States District Court for the Southern District of Georgia, claiming breach of contract and asserting jurisdiction under the Suits in Admiralty Act,

46 U.S.C. 741 *et seq.*[1] After a trial, however, the court dismissed the suit for lack of jurisdiction.[2]

The court reasoned that, even if Cesaroni had in fact entered into a contract with the Customs agents entitling him to a cash award and the immediate return of his boat, "[w]hether a contract action falls within admiralty jurisdiction depends upon the subject matter of the contract, rather than the place where the contract was entered into or was performed" (Pet. App. 15). Here, the court found that neither Cesaroni nor the government had control of the *Rubber Duck* during the smuggling operation (*id.* at 17-18). Instead, "the agreement at issue involved the offer of reliable information in exchange for compensation" (*id.* at 20). As a result, the court held that "the agreement had its basis not in the operation of a ship, its navigation, or its management afloat, but in the unique duty of the Customs Service to protect Government revenues and our people generally from the effects of smuggling activities" (*ibid.*). The district court accordingly dismissed Cesaroni's action without prejudice, directing him to pursue his claim before the Claims Court (*ibid.*).

The court of appeals affirmed without opinion on the basis of the district court's order (Pet. App. 22).

ARGUMENT

1. This Court has held repeatedly that "in contract matters admiralty jurisdiction depends upon the nature of the transaction." *Grant Smith-Porter Co.* v. *Rohde,* 257 U.S.

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[1]Cesaroni's Trustee in Bankruptcy, James L. Drake, Jr., also a petitioner here, was permitted to intervene to protect creditors' interests (Pet. App. 3).

[2]Prior to trial, the court also dismissed Cesaroni's claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, finding the government immune from suit under 28 U.S.C. 2680(c).

469, 476 (1922). See generally *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 172-173 (1976); *Amell* v. *United States*, 384 U.S. 158, 159-160 (1966). As petitioner acknowledges (Pet. 11-12), for a contract claim to fall within the district court's admiralty jurisdiction, it accordingly must present " 'a direct and proximate juridical link between the contract and the operation of the ship, its navigation or its management afloat.' " *Luvi Trucking, Inc.* v. *Sea-Land Service, Inc.*, 650 F.2d 371, 373 (1st Cir. 1981) (quoting 1 E. Jhirad, A. Sann, B. Chase & M. Chynsky, *Benedict on Admiralty* § 183, at 11-7 to 11-8 (7th ed. 1984)). Admiralty jurisdiction thus " 'does not attach to a contract merely because the services to be performed under the contract have reference to a ship, or to its business, or [because] the ship is the object of such services.' " *Ibid.*

Here, petitioners principally contend that Cesaroni's contract was maritime in nature[3] because "he allowed the government to use his property" (Pet. 11)—that is, the *Rubber Duck*. This assertion, however, was rejected as a factual matter by the courts below. The district court thus found "no evidence in the present case to support a finding that either plaintiff or the Government had control of the *Rubber Duck* or its navigation during the attempted drug smuggling operation" (Pet. App. 17-18).[4] Against this

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[3]Petitioners suggest (Pet. 13) that the contract was a "charter party" agreement, which is an agreement "for the hiring or letting of part, or all, of a vessel." 7A J. Moore & A. Pelaez, *Moore's Federal Practice* ¶ .245[1] (2d ed. 1983) (footnote omitted). See generally *United States* v. *Hvoslef*, 237 U.S. 1, 16 (1915).

[4]At most, Cesaroni agreed with the Customs agents to make the *Rubber Duck* available for charter hire by the smugglers. Such a preliminary agreement, however, never has been held to fall within the admiralty jurisdiction—as petitioners themselves acknowledge (Pet. 12). See, *e.g.*, *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.*, 739 F.2d 798, 801-804 (2d Cir. 1984).

background, the court concluded that the agreement between Cesaroni and the government was solely one for the exchange of information, and did not have "its basis * * * in the operation of a ship, its navigation, or its management afloat" (*id.* at 20). This factual finding, which is dispositive here, does not warrant further review.

2. Petitioners' argument that an implied-in-fact bailment contract existed between Cesaroni and the government is similarly unpersuasive. At the outset, it seems clear that no such contract came into existence. Looking to Georgia law for guidance, the district court properly noted (Pet. App. 17) that delivery of the bailed property to the bailee, with the bailee acquiring an independent and temporarily exclusive possession, is essential to creation of a contract of bailment. See *Buckley* v. *Colorado Mining Co.*, 163 Ga. App. 431, 432, 294 S.E.2d 665, 666 (1982); *Atlantic Coast Line R.R.* v. *Baker*, 118 Ga. 809, 810, 45 S.E. 673, 674 (1903); *Hartley* v. *Robinson*, 78 Ga. App. 594, 595, 51 S.E.2d 617, 618 (1949); 8 C.J.S. *Bailments* § 15(a)(2), at 363 (1962). At no time, however, did Cesaroni deliver exclusive possession of the *Rubber Duck* to the government.[5] Cf. *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 466 n.6 (1980); *Kosak* v. *United States*, 465 U.S. 848, 860 n.22 (1984). The government's subsequent seizure and forfeiture of the *Rubber Duck* from the smugglers under the customs and drug abuse laws, 19 U.S.C. 1595a(a), 21 U.S.C. (& Supp. II) 881, moreover, did not give rise to an express or

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[5] *Alliance Assurance Co.* v. *United States*, 252 F.2d 529 (2d Cir. 1958), cited by petitioners (Pet. 13) for the proposition that an implied-in-fact bailment contract existed here, is distinguishable. There, the plaintiff had voluntarily surrendered goods to Customs officers for examination pursuant to statute (19 U.S.C. 1499). 252 F.2d at 531. In contrast to this case, then, *Alliance Assurance Co.* involved a voluntary transfer of exclusive possession of the property in question directly from the plaintiff to the United States.

implied bailment contract, because the act of forfeiture vests title to the property in the government. See *Walker* v. *United States,* 438 F. Supp. 251, 258-259 (S.D. Ga. 1977), citing *United States* v. *Stowell,* 133 U.S. 1, 16-17 (1890).

In any event, even if a bailment contract did come into existence here, it plainly was not maritime in nature. As the district court explained (Pet. App. 20), such a contract would not have had as its basis the operation or navigation of a ship. Instead, the government simply held the *Rubber Duck* pending the completion of the smuggling investigation. Such a bailment would have been no different in kind from the one created (if one is created) when Customs agents seize and hold any other type of property for law enforcement purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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